

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MAY - 7 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Policies and Rules Concerning)
Children's Television Programming)Revision of Programming Policies)
for Television Broadcast Stations)

MM Docket No. 93-48

**COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

Respectfully submitted,
NATIONAL ASSOCIATION OF
BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036

Henry L. Baumann
Executive Vice President &
General Counsel

Valerie Schulte
Sr. Associate General Counsel

Steven A. Bookshester
Associate General Counsel and
First Amendment Attorney

May 7, 1993

No. of Copies rec'd
List A B C D E

CH11

TABLE OF CONTENTS

EXECUTIVE SUMMARY	i
I. Introduction and Summary	1
II. Broadcasters Take Seriously Their Obligations Under the Act and Are Making Meaningful Efforts to Comply	4
III. Congress Expressly and Intentionally Legislated a Specific But Unquantified Children's Programming Obligation and Intended Broad Broadcaster Discretion As To Compliance	8
IV. It Is Premature For the Commission To Consider Abandoning and Contradicting the Carefully Crafted Congressional Scheme	10
V. Quantitative Processing Guidelines Would Be A Significant Intrusion in First Amendment-Protected Content	13
VI. The Commission Should Rely on the Act and its Current Rules As A Sufficient and Better Stimulus To Achieve the Purposes of the Act	16
VII. Conclusion	23

APPENDICIES

EXECUTIVE SUMMARY

The nation's television broadcasters take seriously their obligations under the Children's Television Act to serve the educational and informational needs of children and are making meaningful efforts to comply with the Act and the Commission rules.

As the Commission has suggested in the Notice, program suppliers have not yet produced significant amounts of educational and informational programs, but much more of this fare is becoming available, both from syndicators and the networks. As stations have an opportunity to procure and schedule new educational shows, their showings on renewal records will continue to improve.

Congress expressly and intentionally legislated a specific but unquantified children's programming obligation and intended broad broadcaster discretion as to compliance.

NAB suggests that it is far too premature for the Commission to consider abandoning, and contradicting, the carefully crafted Congressional scheme and, in its place, proposing quantitative requirements and restrictive definitions. Given a certain trend toward stronger performances, and much greater availability of new programming, it would seem unwise at best and foolhardy at worst to abandon Congress' scheme at this relatively early juncture.

NAB appreciates that there may be some uncertainty as to a precise minimum "amount" of educational and informational programming sufficient to meet the programming obligation. But, broadcasters' making good faith and reasonable efforts to respond, given their individual assessment of the needs of children in their

communities, is what was intended by Congress and is what will produce Congress' intended results of serving the child audiences and respecting the broadcasters' programming judgments.

Quantitative programming guidelines, whether by rule or by processing guidelines, would involve government in too great a way in First Amendment-protected content decisions. Any greater specificity, by government, as to amount and type of programming simply cannot be squared with the First Amendment, nor with the intentions of Congress.

The Commission should rely on the Act and its current rules as a sufficient and better stimulus to achieve the purposes of the Act. Quantified processing guidelines, and other changes in the rules suggested in the Notice, also well might work at cross purposes to the goals of the Act to improve and expand children's television programming options. Licensees' individual assessments and judgments and flexibility (all intended by Congress) would go out the window, replaced, most likely, by a numbers game.

So too should the Commission refrain from revising its rules in other respects that were suggested in the Notice, namely reduced emphasis on short-segment programming, re-definition of "educational and informational" programming and specific scheduling requirements.

NAB strongly urges the Commission to demur from further delineation of the sensitive program decisions Congress has required of and reserved for broadcasters in the area of children's educational and informational programming.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED
MAY - 7 1993
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Policies and Rules Concerning)
Children's Television Programming) MM Docket No. 93-48
)
Revision of Programming Policies)
for Television Broadcast Stations)

**COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters ("NAB")^{1/} hereby submits its comments in response to the recent Notice of Inquiry^{2/} in the above-captioned docket.

I. Introduction and Summary.

From the earliest days of the legislative process that ultimately produced the Children's Television Act of 1990^{3/} through the FCC proceeding that proposed and adopted rules to implement the Act to the recent Congressional hearing on compliance with the Act, the National Association of Broadcasters, on behalf of its member stations and networks, has been an active participant and commenter.

NAB has, at every stage, attempted to be constructive and contributory to legislation and rules that members of Congress believed necessary to achieve the

^{1/} NAB is a nonprofit, incorporated association which serves and represents America's radio and television broadcast stations and networks.

^{2/} Notice of Inquiry in MM Docket No. 93-48, 8 FCC Rcd 1841 (1993).

^{3/} Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, codified at 47 U.S.C. Sect. 303a, 303b, 394.

goal of improving children's television. We have understood, we believe, the intentions of Congress and the compromises of language and substance necessary to fashion and pass this legislation. NAB, on behalf of its television membership, acceded to this legislation. We have attempted to educate our membership on the requirements of the implementing rules adopted by the Federal Communications Commission. We daily answer questions from member stations on interpretation and application of these rules. We have stressed to our membership the importance of compliance with the Act and the rules.

We believe that the television station operators of this country understand the seriousness of the obligations imposed on them under the Act and the rules and we believe that they are attempting to and, in fact, are, in progressively better and better fashion, complying with the Act and the Commission's rules implementing it.

These station operators appreciate that the Act imposes, for the first time, a specific albeit unquantified statutory programming obligation, to wit, to serve the educational and informational needs of children in their overall programming, "including programming specifically designed to serve those needs." And they appreciate that the Commission is under a statutory command to conduct a review at renewal time of each station's record in this regard. These stations would not be so foolish as to disregard the intentions and mandates of Congress and invite sanctions by the FCC and risk their licenses.

NAB believes that virtually all stations are presenting some standard length educational and informational programming for children and that most stations are working to improve and expand their response to this programming obligation. We believe a review of the renewal records demonstrates this.

We also believe that many stations may, in fact, as the instant Notice suggests, be uncertain as to the "required" amount of educational and informational programming. But NAB believes that this uncertainty necessarily flows from the carefully crafted scheme adopted by Congress to achieve its aims while avoiding more-than-necessary government intrusion in First Amendment-sensitive content.

NAB believes that the Commission, in adopting its implementing rules, appreciated the balance intentionally and knowingly struck by Congress in imposing a specific programming obligation in unquantified terms, with broad discretion and flexibility accorded broadcasters in complying with the Act.

NAB here suggests that the present Commission should continue to respect that Congressional scheme and give the Act, broadcasters and the production community time to generate and present more and better programming in response to the Act, all the while continuing its mandated enforcement of the requirements of the Act and its own rules. The Commission, in deference to the Congressional scheme and in respect of the First Amendment, should resist the temptation to move to easy-to-enforce quantified programming processing standards that can reduce the effort to produce more and better children's programming to a numbers game yielding low quality unwatched uninspiring "required" programming.

NAB maintains that the Act is working, that there is more and more high quality educational and informational programming becoming available and being added to stations' lineups, that Congress struck the right balance in enacting an unquantified yet specific programming obligation suffused with broad broadcaster discretion, that broadcasters appreciate the importance of this obligation and, importantly, that it is premature to conclude otherwise.

II. Broadcasters Take Seriously Their Obligations Under the Act and Are Making Meaningful Efforts to Comply.

From the time the Commission adopted its Report and Order^{4/} and rules implementing the Children's Television Act NAB has been conducting sessions for broadcasters^{5/} on the Act and the rules and has been communicating with its television members about the rules by distributing a special Counsel Memo on the rules and by inserts in regular newsletters. In all those sessions and communications, we have stressed the seriousness of the obligations imposed by the Act and the rules and the importance to each station's renewal of compliance with the requirements of the rules, particularly the requirement of the Act that each station present specifically designed

^{4/} Report and Order in MM Docket No. 90-570, 6 FCC Rcd 2111 (1991).

^{5/} Panel session at NAB Convention, April 17, 1991; NAB Service to Children Television Symposium, October 24, 1991 (including participation of Chief of Video Services Division of FCC Mass Media Bureau); Live Closed Circuit Televised Session and Call-In for all television stations, December 13, 1991; two Panel sessions at NAB Convention, April 14 and April 15, 1992; NAB Service to Children Television Symposium, October 1, 1992 (including participation of Chief of Video Services Division of FCC Mass Media Bureau); Panel session at NAB Convention, April 21, 1993 (including participation of Chief of Video Services Division of FCC Mass Media Bureau).

educational and informational programming for the child audience. We daily answer questions from television stations about the children's television rules as well.

NAB believes, based on the communications we have had with individual television stations, with NAB Television Board members and with communications counsel for television groups and stations, that virtually all television stations take very seriously the requirements of the Act, particularly the programming obligation, and are making meaningful efforts to comply with the Act and the rules.

The Commission itself notes in the Notice, supra at ¶ 1, that the majority of the renewal applications reviewed as of that date demonstrated adequate efforts to meet the programming needs of children.

NAB believes that the efforts of stations to meet the programming obligation of the Act are demonstrated by the increasingly stronger educational and informational program showings in the recent renewal records submitted to the

Commission and we submit that these programming showings will continue to evidence

informational programs.^{6/} We are confident that the more recent renewal submissions are stronger than those coming earlier and that this trend will continue.

Each year NAB holds a "Service to Children" Television Awards competition, which showcases some of the outstanding work that local broadcasters are doing on regularly scheduled programs, special programs, public service campaigns aimed at children, and ethnic or minority programming. Last year, we saw a marked increase in the number of entries submitted for this competition, especially in the regularly-scheduled category. More than 70 stations entered nearly 200 different programs, with an equal distribution among large, medium and small markets. Those programs dealt with such issues as AIDS, the environment, life as a teen in modern society, drug and alcohol abuse and prevention, and health, safety and fitness.^{7/} The number of new entrants signals an increase in such programming nationwide. This is encouraging, given that it takes many months to plan and develop new programs.

As the Commission has suggested in the Notice, at n. 11, program suppliers have not yet produced significant amounts of educational and informational programs,^{8/} but press reports indicate that much more of this fare is becoming

^{6/} See, e.g., fn. 48 and accompanying text and Appendix D, for early efforts of stations most severely criticized in a much publicized study.

^{7/} See, for examples of the kind of quality programming that stations have developed, Written Testimony of the National Association of Broadcasters Before the House Committee on Energy and Commerce Telecommunications and Finance Subcommittee on Children's Television. March 10, 1993. at n. 6. appended hereto as Appendix A.

available, both from syndicators and the networks.^{9/} As stations have an opportunity to procure and schedule new educational shows, their showings on renewal records will continue to improve.

The Commission's Notice, at ¶ 6, also states that the number of hours devoted to children's programming "do not appear to have substantially changed." NAB respectfully submits that there is no baseline number of hours per station on which to make such a judgment, as the Commission, before the Act, was not collecting data on the number of hours of children's programming that stations present. NAB believes that stations' today take their obligations under the Act seriously and are making meaningful efforts to serve their child audiences. We believe that the growth in the availability of educational and informational programming will enable those efforts to produce new and more programs in the future. We also believe that the recent House hearing on children's television and the instant Inquiry by the Commission further will underscore for licensees the importance of their presenting programming specifically designed to serve the educational and informational needs of their child audiences. The scheme set up by the Congress to improve children's

^{9/} See, appended hereto as Appendix B, Steve McClellan, "Stock rises for FCC-friendly kids fare," Broadcasting & Cable, May 3, 1993, p. 34; Harry A. Jessel, "Bill Nye is BVT's educational guy," Broadcasting & Cable, Apr. 26, 1993, p. 47; Jon LaFayette, "New Saturday a.m. slates full of 'kiducational' fare," Electronic Media, Apr. 19, 1993, p. 3; Thomas Tyrer, "Disney plans new first-run show," Electronic Media, Mar. 29, 1993, p. 2; John Dempsey, "Will FCC Stunt Kids' Ratings?", Variety, Mar. 29, 1993, p. 28; Thomas Tyrer, "'Beakman' exiting first-run for CBS."

television can achieve its objectives and it should be given time by the Commission to do so.

III. Congress Expressly and Intentionally Legislated a Specific But Unquantified Children's Programming Obligation and Intended Broad Broadcaster Discretion As To Compliance.

The Congress, over three years and after many hearings and many versions of legislation and much negotiation, agreed on and passed legislation establishing, for the first time, a specific statutory children's programming obligation. That statutory obligation is for each station to serve the educational and informational needs of children "through the licensee's overall programming, including programming specifically designed to serve such needs."^{10/}

The Act itself makes no more mention than that of the content of this obligation. But the legislative history -- both the House and Senate Committee Reports^{11/} and the floor debates on the bill -- make crystal clear that Congress intended no quantification of this programming standard^{12/} and that it intended to afford broad discretion and flexibility to broadcasters in defining and meeting their programming obligation.^{13/}

^{10/} The Children's Television Act of 1990, supra, § 103(a).

^{11/} S. Rep. No. 227, 101st Cong., 1st Sess. (1989) ("Senate Report"); H.R. Rep. No. 385, 101st Cong., 1st Sess. (1989) ("House Report").

^{12/} House Report at 17; Senate Report at 23; 136 Cong. Rec. S10122 (daily ed. July 19, 1990) (remarks of Sen. Daniel Inouye); 136 Cong. Rec. H8537 (daily ed. October 1, 1990) (remarks of Rep. Edward Markey).

^{13/} 136 Cong. Rec. S10121 (daily ed. July 19, 1990) (remarks of Sen. Daniel Inouye).

This guiding principle seen in the legislative history, that the broadcaster should be afforded the "greatest possible flexibility in how it discharges its public service obligation to children"^{14/} and that the "committee expects that the Commission will continue to defer to the reasonable programming judgments of licensees"^{15/}, was reflected throughout the Commission's Notice^{16/} proposing rules to implement the Act and in its Report and Order^{17/} announcing its rules.

The Commission's Report and Order similarly recites that "the legislative history suggests that Congress meant that no minimum amount criterion be imposed" and refers to "this strong legislative direction, and the latitude afforded broadcasters in fulfilling the programming requirement."^{18/}

So too does this instant Notice of Inquiry acknowledge the explicit intentions of Congress with regard to the broadcaster discretion and "Congress' express preference for avoiding quantitative standards."^{19/}

Thus, there is no question as to the scheme established by Congress to see its goals of expanding the educational and informational programming available to children achieved and its intentions that there be no quantification of the programming

^{14/} Id. at 10121.

^{15/} Id. at 10122.

^{16/} Notice of Proposed Rule Making in MM Docket No. 90-570, 5 FCC Rcd 7199 (1990).

^{17/} Report and Order in MM Docket 90-570, 6 FCC Rcd. 2111 (1991).

^{18/} Id. at ¶ 24.

^{19/} Notice, supra at ¶ 5.

obligation and that broadcasters be afforded wide discretion in programming to meet their obligation.

NAB suggests that the Commission's current concern over the long term performance and compliance of broadcasters with the Act is premature and that the Congressionally-devised scheme should be given time to produce its intended results.

IV. It Is Premature For the Commission To Consider Abandoning and Contradicting the Carefully Crafted Congressional Scheme.

NAB suggests that it is far too premature for the Commission to consider abandoning, and contradicting, the carefully crafted Congressional scheme and, in its place, proposing quantitative requirements^{20/} and restrictive definitions. Broadcasters' performance in the first year of the Act's requirements was, in the Notice's terms, "adequate" and, as discussed above, there is every reason to expect more and better programming to be provided with the spate of new productions of educational and informational fare and the new shows being added to network lineups. Broadcasters, who, up until now, have had to engage in bidding contests in recessionary times to get the few available quality educational shows, now will have much greater supply. And they will have had the opportunity to reorganize their schedules to accommodate new shows.

The Commission, too, has just sampled a percentage of television stations in the renewals it has reviewed. NAB is confident that the more recent

^{20/} As is discussed infra p. 17, quantitative staff processing guidelines amount to mandatory quantitative rules. The Notice acknowledges as much, at ¶ 9.

reviews have revealed much stronger responses than those coming before. Given a certain trend toward stronger performances, and much greater availability of new programming, it would seem unwise at best and foolhardy at worst to abandon Congress' scheme at this relatively early juncture.

The Commission states in the Notice that it believes "that broadcasters may remain uncertain as to the scope of their programming obligations"^{21/} and that this uncertainty may account for "the apparent lack of growth in children's programming."^{22/}

NAB appreciates that there may be some uncertainty as to a precise minimum "amount" of educational and informational programming sufficient to meet the programming obligation. But, NAB maintains that broadcasters' making good faith and reasonable efforts to respond, given their individual assessment of the needs of children in their communities, is what was intended by Congress and is what will produce Congress' intended results of serving the child audiences and respecting the broadcasters' programming judgments. As the Commission's Report and Order put it, "the amount of 'specifically designed' programming necessary to comply with the Act's requirement is likely to vary according to other circumstances, including but not limited to, type of programming aired and other nonbroadcast efforts made by the station."^{23/} As stations may consider other programming presented in their markets

^{21/} Notice, supra at ¶ 7.

^{22/} Id.

^{23/} Report and Order, supra at ¶ 24.

in determining their individual responses, and as stations and markets differ in other respects, it would be difficult even to establish an acceptable "minimum" amount for all stations.

NAB also maintains that it is premature to conclude that there is an "apparent lack in growth of children's programming,"^{24/} because, as mentioned above, the Commission does not have before it a baseline on which to make such a judgment.

NAB also suggests that it is premature to conclude that there is a need to further define the type of programming that will serve the educational and informational needs of children. Again, the legislative history is quite clear as to what programming can qualify^{25/} and the Commission's Report and Order specifically adopted the definition proffered by Congress.^{26/}

NAB believes that stations receive sufficient guidance from the Commission's definition to know what programming they can rely on to satisfy, as the Commission has put it, their "core" obligation for "specifically designed" educational

^{24/} Notice, supra at 7.

^{25/} Senator Inouye, in discussing this point during Senate consideration of the bill, stated that:

"[e]ducational and informational needs encompass not only intellectual development, but also the child's emotional and social development. Prosocial programming which assists children to discover more about themselves, their families, and the world would qualify."

136 Cong. Rec. S10122 (daily ed. July 19, 1990).

^{26/} See, Report and Order, supra at ¶ 21.

and informational programming and what programming might contribute to their service to children in their "overall" programming^{27/} and, in any event, it is to them

before the House, "[w]e can do no more and still be consistent with the first amendment."^{30/}

It is obvious, therefore, that the constitutionality of quantitative processing guidelines would be open to serious question under the First Amendment. Yet in its new Notice, the Commission directly addresses the possibility of adopting guidelines specifying the amount and content of specific types of programming which must be directed to a designated audience. Mandating such content-specific programming would run headlong into First Amendment protection of speech.^{31/}

The Supreme Court has held that the constitutional guarantee of freedom of speech is "a term necessarily comprising the decision of both what to say and what not to say."^{32/} The Court has found that while "the essential thrust of the First Amendment is to prohibit improper restraints on the voluntary public expression of ideas", this necessarily implies "a concomitant freedom not to speak publicly, one

^{30/} Congressional Record, H 8541 (daily ed. October 1, 1990).

^{31/} Contrast this with the reduced scrutiny under the First Amendment given to restrictions which only incidentally infringe speech. See United States v. O'Brien, 391 U.S. 367, 377 (1968). The requirements proposed by the Commission in this proceeding are readily distinguishable from the must carry requirements imposed by the Cable Act, 47 U.S.C. §§ 614-15; see Turner Broadcasting System v. United States, Civ. Action No. 92-2247 (D.D.C. April 3, 1993). Unlike the must carry provisions, quantitative children's programming requirements would be directly content-based and would be justified on the basis of that content, and would require broadcasters to carry programs with which they would be identified. Further, unlike the must carry provisions, requiring broadcasters to carry specified amounts of children's programming would inevitably and permanently decrease the ability of television stations to carry other types of programming.

^{32/} Riley v. National Federation of the Blind, 487 U.S. 781, 796 (1988).

which serves the same ultimate end as freedom of speech in its affirmative aspect."^{33/}

While the Commission attempts in the Notice to dress up such a requirement as a mere procedural matter, stating that "failure to meet the guideline would not necessarily result in any sanction or non-renewal"^{34/}, it acknowledges that "processing guidelines in the renewal area can take on the force of a rule, at least in the

operation of the Commission."^{35/} It is evident that the Commission would indeed have such a

brush approach to mandated content which it proposes is sufficiently "narrowly tailored" to meet judicial scrutiny.^{37/}

Rather than intruding the government into First Amendment - sensitive content in so specific a way, NAB suggests that the Commission continue, for good

the necessity of following specific dictates as to amount and type of programming to present.

And it cannot be seriously doubted that quantified processing guidelines amount to specific required dictates, with the practical effect of mandatory programming rules. Licensees would be as constrained to program in strict accordance with the government's quantitative processing guidelines -- so as not to place their licenses in jeopardy -- as they would be with mandatory rules. Their individual assessments and judgments and flexibility (all intended by Congress) would go out the window, replaced, most likely, by a numbers game. For, faced with the regulators' rules as to quantity (and perhaps type and time), the broadcaster's emphasis of necessity would be shifted to numbers of minutes rather than content. And its focus would be shifted away from what Congress intended to be service to children's educational and informational needs "through the licensee's overall programming, including programming specifically designed to serve such needs."^{39/}

Perhaps what the Notice characterizes as "uncertainty," and what the Congress intended as discretion and flexibility, will spur better and more educational and informational programming for children than would the security of "numbers." The Commission should, surely, give the Congressional scheme a chance, and withhold the precipitous and premature action suggested in the Notice.^{40/}

^{39/} The Act, § 103 (a)(2).

^{40/} NAB appreciates the difficulty the FCC faces in processing renewal applications and determining "how much is enough" educational and informational programming on case-by-case bases, considering each station's entire programming response and, at the

So too should the Commission refrain from revising its rules in other respects that were suggested in the Notice, namely reduced emphasis on short-segment programming, re-definition of "educational and informational" programming and specific scheduling requirements.

NAB agrees with the Commission that standard-length educational and informational programming is important, indeed necessary,^{41/} in meeting the Act's programming obligation. But NAB believes that that much is clear and that the Commission should not propose to specifically "label" short segment programming as only secondarily important, as is suggested in the Notice. If that were done, NAB would fear that, as is discussed above with regard to requiring specific amounts of programming, this valuable type of programming might be discounted by both broadcasters and the Commission.

Rather, as is noted in the Report and Order,^{42/} short segment programming is well suited to children's short attention spans and can often be locally produced with acceptable production quality and thus "may be a particularly

same time, being even-handed and consistent in evaluating all stations. Should the Commission, as a matter of its internal review of renewal records in connection with the children's programming requirement, now utilize or subsequently adopt internal processing guidelines, NAB urges the Commission to make public, by Public Notice or otherwise, the content of any such guidelines.

^{41/} See Memorandum Opinion and Order in MM Docket No. 90-570, 6 FCC Rcd 5093, at ¶ 41,42, (1991), where the Commission, on reconsideration, clarified that broadcasters must air "some standard-length" children's programs to fulfill the programming renewal review requirement.

^{42/} Report and Order, supra at ¶ 25. See also Memorandum Opinion and Order, supra at 42.

appropriate way for a local broadcaster to respond to specific children's concerns."^{43/}

Short segments also can be effective in reinforcing particular messages and, when placed in or adjacent to popular entertainment shows, can reach large numbers of

children. NAB suggests that this important form not be discounted by the Commission

the Commission adopted the general definition discussed by Senator Inouye during Senate consideration of the bill.

NAB submits that, given the general guidance in the legislative history and in the Report and Order, broadcasters have no problem making the "reasonable programming judgments" as to what programming can serve to satisfy their "core" programming obligation, as opposed to programming that may contribute something of value to children, but that does not serve this "core" function.

NAB maintains that the much publicized listings on some renewal applications of entertainment shows with "educational or informational" characterizations were submitted with a "throw in everything including the kitchen sink" view during the first renewal review under the Act, when there was not new programming available and when licensees and their lawyers were understandably particularly nervous about a first review. NAB further maintains that those much criticized listings in fact contained programming of solid educational and informational merit^{48/} and that those stations may have been guilty of overkill in their listings but not of trying to rely on entertainment shows to meet their "core" obligation.

Similarly, licensees would be foolhardy to rely on entertainment programs with "wrap-around" pro-social messages for satisfaction of their "core" programming obligation, rather than perhaps as simply contributing to their overall

^{48/} See Appendix D here attached for "core" educational and informational programs presented and listed by the stations most severely criticized in a much publicized study that looked at program responses during the first three months under the program requirement of the Act.

performance. NAB suggests that the Commission, instead of further defining content to avoid what already should be obvious, require any licensee appearing to rely on such programming for its "core" programming response to substantiate its judgment in this regard.^{49/}

NAB submits that, here as with other issues, the Commission should give the Congressional intentions and scheme time to work and should refrain from further defining First Amendment-sensitive programming content. NAB further suggests that the refinement specified in the Notice would, perhaps wrongheadedly, move the definition of educational and informational towards the purely instructional, which clearly was not intended by Congress^{50/} or by the Commission.^{51/}

Similarly, NAB believes it would not serve the goals of the Act or the needs of children to relegate to "implicit" or "secondary" status the entertainment value of educational and informational programming. We would assert that any type of children's programming must have high entertainment value to be watched and assimilated. Here, as elsewhere, we believe that it could be counter-productive to the goals of the Act for government to insert itself in programming decisions.

NAB submits that the Commission, for the same reasons expressed above, should refrain from specifying days, day parts or specific time slots when

^{49/} See Report and Order, supra at ¶ 26, where the Commission states that, where such program determinations are in doubt, it will expect licensees to substantiate their determinations.

^{50/} 136 Cong. Rec. S10122 (July 19, 1990) (remarks of Sen. Inouye).

^{51/} Report and Order, supra at ¶ 20,21.